Nos. 07-21 and 07-25

In the Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF
UNITED STATES SENATOR DIANNE FEINSTEIN,
UNITED STATES REPRESENTATIVE ROBERT A. BRADY,
AND UNITED STATES REPRESENTATIVE ZOE LOFGREN
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS
[Federal Preemption]

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INTEREST OF THE AMICI[1]

Indiana's requirement that all voters present government-issued photo identification before casting an official ballot in federal elections is inconsistent with mandatory voter identification requirements enacted in the Help America Vote Act of 2002. Amici are current Members of Congress who have significant interests in the resolution of this issue.

United States Senator Dianne Feinstein is the senior United States Senator from the state of California. She also is the current Chair of the Senate Rules and Administration Committee, which is the committee of jurisdiction for proposed legislation related to federal elections. As a member of the Rules and Administration Committee in the 107th Congress, she participated in the bipartisan negotiations and debates on the Help America Vote Act of 2002. Senator Feinstein has a strong and continued interest in ensuring the fair and equitable administration of federal elections.

United States Representative Robert A. Brady represents the First District of Pennsylvania and is the current Chair of the Committee on House Administration. The Committee on House Ad-

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to Rule 37.6, no counsel for a party authored this brief, in whole or in part. No person or entity other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ministration is the committee of the United States House of Representatives responsible for considering proposed legislation related to federal elections. The Committee was instrumental to the passage of the Help America Vote Act of 2002. Representative Brady is committed to strengthening the integrity of the federal election process and protecting the right to vote.

United States Representative Zoe Lofgren represents the Sixteenth District of California and is the current Chair of the Subcommittee on Elections. A division of the Committee on House Administration, the Subcommittee on Elections has direct jurisdiction over all proposed legislation related to federal elections. Representative Lofgren believes strongly in the importance of strengthening the fairness, accessibility, and integrity of federal elections.

SUMMARY OF THE ARGUMENT

Although the parties in this case address the constitutional question presented by Indiana's photo identification requirement, the issue of federal preemption, while not argued below, may be considered separate and apart from the equal protection claim and is "ultimately dispositive of the present dispute." *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990).[2] The Help America Vote Act of

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[2] For the Court to resolve a question based on an issue or argument not raised below is not without precedent. *See, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing question raised only in *amicus* brief. Court stated that its

2002 ("HAVA") requires a narrowly defined class of voters to present either photo identification or one of several alternative forms of identification before casting a ballot in federal elections. *See* 42 U.S.C. §§ 15301-15545 (2006). The requirement is mandatory – states may neither add to the requirement nor subtract from it. Yet pursuant to a state law adopted in 2005, Indiana requires *all* voters to present valid government-issued photo identification before casting a ballot in federal elections, and requires certain first-time voters to present more than one form of identification. To the extent that Indiana enforces its photo identification requirement in federal elections, the requirement is contrary to federal law. *Amici* urge the Court to find that with respect to voters in federal elections, the limited identification requirement in HAVA preempts the Indiana photo identification requirement. The judgment below should be reversed.[3]

"*sua sponte* consideration of retroactivity is far from novel"); *McCleskey v. Zant*, 499 U.S. 467, 522-23 (1991) (Marshall, J., dissenting) (stating that majority opinion relied on argument raised by *amicus*, but not in the courts below); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-37 (1991) (Stevens, J., dissenting) (stating that Court should have addressed argument raised for the first time by amici); *Arcadia*, 498 U.S. at 77 (deciding case based on issue not raised below or in any of the briefs before the Court).

[3] Although *amici* suggest that the Court resolve the question on the basis of federal preemption without reaching the constitutional question presented, nothing in this brief is intended to imply that Indiana's photo identification requirement does not violate the First and Fourteenth Amendments to the United States Constitution.

Article 1, section 4 of the United States Constitution invests Congress with the authority to make or alter regulations governing the time, place and manner of federal elections. In *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932), this Court affirmed Congress's broad authority to regulate and supervise federal elections, and recognized Congress's ability to substitute its judgment for the judgment of a state in matters relating to the administration of federal elections. *See also Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) ("Although the United States Constitution, and Supreme Court decisions interpreting the Constitution, give primary responsibility for administering and regulating elections to the States, the States must adhere to certain constitutional and statutory requirements."). Congress exercised its constitutional authority when it enacted HAVA's voter identification requirement. 42 U.S.C. § 15483(b) ; *see also* Remarks by the President at Signing of H.R. 3295, Help America Vote Act of 2002, October 29, 2002 ("The administration of elections is primarily a state and local responsibility. The fairness of all elections, however, is a national priority."). The federal law requires a small class of voters, those who register by mail and have not previously voted in the state, to present identification before casting a regular ballot in a federal election. *See* 42 U.S.C. § 15483(b). Aware that a strict photo identification requirement would disenfranchise some eligible voters, Congress specified a list of acceptable alternative forms of identification. *See id.* Congress also deliberately limited application of

the identification requirement to first-time voters who registered by mail. *See id.*

Substituting its own judgment for that of Congress, Indiana has imposed an identification requirement that is inconsistent with the requirement in HAVA. *See* IND. CODE § 3-5-2-40.5 (2007); § 3-11-8-25.1 . It requires all voters to present a very specific form of photo identification before casting an official ballot in federal elections. The command of Congress, however, is clear – in the context of federal elections, only first-time voters who registered by mail may be required to present identification. Congress further requires that such voters be given a choice of presenting either photo identification or one of several alternative documents. Given the federal mandate, a state may no more require all voters to present identification than it may permit first-time voters who registered by mail to present no identification. It may no more limit the federally permissible forms of identification required than it may allow first-time voters who registered by mail to provide only a signature. Federal law precludes a state from altering the requirement either by adding to it or subtracting from it.

HAVA was a carefully balanced, bipartisan effort to improve the conduct of our national elections. As such, it required compromises between Members, including *amici*, who were concerned that too many eligible voters were regularly denied their right to vote because of irregularities in the administration of federal elections and other Mem-

bers who shared that concern but sincerely felt that additional measures were necessary to protect against voter fraud. HAVA's voter identification requirement reflects the delicate balance that Congress achieved after weighing the merits of both concerns. The Indiana law that is now before this Court upsets that balance.

It is inconceivable to *amici* that Congress would have gone to the lengths that it did to narrowly define the class of voters subject to the requirement, and to specify the types of identification that may be required of a voter, if it did not intend states to adhere to the law as written. While *amici* did not believe that an identification requirement was necessary, they supported the legislation because it allowed voters to present alternatives to photo identification and was limited to first-time voters who registered by mail. Indiana has nullified these alternatives, and even goes so far as to require first-time voters who registered by mail to meet two separate identification requirements. *See* § 3-7-33-4.5(a) ; § 3-11-8-25.2(b) . Rather than protecting a citizen's right to vote, Indiana has used the federal requirement from HAVA to create an additional impediment to voting.

It should not be forgotten that Congress passed HAVA in response to egregious aspects of the administration of elections in this country that were exposed in the wake of the 2000 presidential elections. First and foremost, the goal was to protect the franchise – to make it easier, not harder, for every eligible citizen to vote, and to have his or her

vote counted. *See* H.R. REP. NO. 107-329(I), at 38 (2001) ("Studies of the nation's election system find that a significant problem voters experience is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters."). Congress recognized that certain measures designed to protect against fraud may have the unwelcome effect of denying eligible voters their right to vote.

This concern is evident in the care that Congress took in crafting HAVA's identification requirement. Congress would not have expended the effort and *amici* would not have supported the bill if states could freely ignore its requirements. HAVA requirements are not hortatory, nor were they intended merely as a set of good practices. They are national requirements for the conduct of federal elections to which states must conform – purposefully designed to assure that no eligible citizen loses his opportunity to vote because of an unduly restrictive state regulation.

The Indiana identification requirements, far more extensive than the limited requirement permitted in HAVA, "stand as an obstacle" to the execution of federal purpose and intent. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Although HAVA does not preclude a state from establishing its own election administration and technology requirements, the state requirements must not be "inconsistent" with the requirements established under HAVA. *See* 42 U.S.C. § 15484 . The provi-

sions of the Indiana statute at issue in this case are inconsistent with the federal requirement. Indiana law precludes voters from presenting the alternate forms of identification that HAVA deems to be sufficient for voting in federal elections, and requires all voters to present identification rather than limiting the requirement to first-time voters who registered by mail. Accordingly, the Court should find that federal law preempts Indiana's photo identification requirement.

ARGUMENT

FEDERAL VOTER IDENTIFICATION REQUIREMENT IN HELP AMERICA VOTE ACT OF 2002 PREEMPTS INDIANA STATE LAW

A. Help America Vote Act of 2002 Asserted Congressional Authority in Administration of Federal Elections and Imposed Mandatory State Requirements.

In 2001, Congress resolved to address numerous inadequacies and irregularities in the administration of federal elections that had come to light in the wake of the 2000 presidential election. Among the problems that motivated Congress to act were "inadequate voter education; confusing ballots; outdated and unreliable voting machines; poll workers who were unable to assist voters who needed assistance because they were overwhelmed or undertrained, or both; and registered voters who were wrongly denied the right to vote." 148 CONG. REC. S2527 (2002) (statement of Sen. Daschle). Members of Congress, including *amici*,

emphasized the need for national standards in the administration of federal elections. *See* Election Reform: Hearings Before the Senate Committee on Rules and Administration, 107th Cong., 1st Sess., 132 (2001) (statement of Sen. Feinstein) ("I would be very supportive of legislation which would require States to meet uniform and nondiscriminatory standards in technology and administration."). After months of congressional debate and bipartisan negotiation, the enactment of the Help America Vote Act of 2002 asserted "the authority, and responsibility, of Congress to regulate the administration of Federal elections, both in terms of assuring that voting systems and procedures are uniform and nondiscriminatory for all Americans and in ensuring the integrity of federal election results." *Id.* at S2528 (statement of Sen. Dodd); *see also id.* at S2527 (statement of Sen. Daschle) ("Our system leaves it to States to decide the mechanics of election procedures. But the right to vote is not a State right. It is a constitutional guarantee. And it is up to us to see that it is protected."). Overwhelmingly adopted by the House and the Senate, the bill was signed by President George W. Bush on October 29, 2002.

HAVA established "federal requirements for the conduct of Federal elections to ensure that the most fundamental of rights in a democracy – the right to vote and have that vote counted – is secure." *Id.* at S2528-29 (statement of Sen. Dodd); *see also id.* at S2527 (statement of Sen. Daschle) ("By working together, our colleagues have produced legislation that will protect the most basic of

all American rights: the right to vote, and to have that vote counted."). The standards were mandatory. Congress specifically drafted the legislation so that states would not be "allowed to opt out of the recommended changes in Federal elections." *Id.* at S2532 (statement of Sen. Dodd). On the contrary, "minimum Federal requirements would ensure that every eligible voter can cast a vote and have that vote counted." *Id.* (statement of Sen. Dodd).

HAVA was the product of months of bipartisan debate and negotiation. Members of Congress – Democrats and Republicans – took ownership of their obligation to "make it easier to vote and harder to cheat," and fully expected that the compromise they reached would govern the administration of federal elections across the country. *Id.* at S718 (statement of Sen. Bond); *see, e.g., id.* (statement of Sen. Bond) ("Every American citizen—appropriate age, appropriate qualifications, properly registered—ought to be able to cast a ballot without difficulty. They also ought to be able to do that only once."); *id.* at S710 (statement of Sen. Dodd) ("All of us worked many months to develop legislation that would try to meet one central goal: that was to make it easier to vote in America and much harder to corrupt our Federal election system."); *id.* at S2527 (statement of Sen. McCain) ("The compromise ... included provisions that would both include mandatory Federal standards to make the election process easier for legitimate voters and prevent voter fraud."). Determined to ensure greater uniformity and accountability in

federal elections, Congress imposed mandatory requirements carefully tailored for that purpose. The Act specifically required states to be in compliance with the requirements by a certain date, and allowed state requirements to deviate from the federal requirements only to the extent that they remained consistent with federal law. *See* 42 U.S.C. § 15484.

B. Congressional Compromise Limited Applicability of Voter Identification Requirement and Provided Expansive List of Permissible Forms of Identification.

HAVA's narrowly constructed voter identification requirement reflects the spirit of compromise present throughout the Act. *See* 148 CONG. REC. S712 (2002) (statement of Sen. McConnell) ("[T]he Dodd-McConnell bill is a comprehensive compromise."); *id.* at S1224 (statement of Sen. Bond) (identification requirement represented "key anti-fraud provision that was carefully negotiated over 6 months as part of a bipartisan compromise"). In the limited case of individuals who registered to vote by mail and have not previously voted in a federal election in the state (or jurisdiction if the state does not have a computerized registration list), HAVA requires such individuals to present either a "current and valid photo identification" or "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter" before casting an official ballot in federal elections. 42 U.S.C. § 15483(b)(2)(A)(i). The re-

quirement does not apply to individuals who submit as part of their registration a copy of the aforementioned identification; nor does it apply to individuals who submit with their registration either the last four digits of their social security number or their drivers' license number, and such number is "matched" with information already on file with the state election board. *See* 42 U.S.C. § 15483(b)(3).

The original version of the federal voter identification requirement appeared in the manager's amendment to the Equal Protection of Voting Rights Act of 2001, an election reform bill reported out of the Senate Committee on Rules and Administration on November 28, 2001. *See* S.A. 2688, 102d Cong. § 103(b) (2001); 147 CONG. REC. S13766 (2001) ; *see also* S.565, 102d Cong. (2001). Senator Chris Dodd, Democrat of Connecticut and chair of the Senate Committee on Rules and Administration, introduced the amendment on behalf of himself and Senators McConnell, Schumer, Bond, Torricelli, McCain, and Durbin. Senators on both sides of the aisle hailed the proposed compromise as a bipartisan achievement. The House version of the election reform bill, introduced and referred to the Committee on House Administration on November 14, 2001, did not include any version of the identification requirement until the Senate provision was incorporated in the conference committee process late in 2002. *See* H.R. 3295, 102d Cong. (2001).

When the Senate formally considered the election reform bill in February and March of 2002, Democrats and Republicans emphasized the work that they had done to balance the goals of protecting the right to vote and preventing voter fraud. Central to the debate was the compromise Senators had reached on requiring certain first-time voters to present identification before casting a ballot. Even Senator Bond, widely acclaimed on a bipartisan basis for taking the lead on anti-fraud provisions throughout the bill, emphasized the commitment he had to "taking every precaution to protect the rights of legal voters." 148 CONG. REC. S720 (2002) (statement of Sen. Bond). He and others believed that the identification requirement succeeded only if it were applied in concert with provisions designed to make it easier for voters to vote. *See id.* (statement of Sen. Bond) ("I told [Sen. Dodd] that election reform without protections against vote fraud could not earn my support. He listened, and we talked a great deal and agreed on a formula that we believed could attract bipartisan support.... We worked closely together for several months to close loopholes while taking every precaution to protect the rights of legal voters. That is what I think we have done."); *id.* at S710 (statement of Sen. Dodd) ("All of us worked many months to develop legislation that would try to meet one central goal; that was to make it easier to vote in America and much harder to corrupt our Federal election system.").

Democrats tested the strength of the bipartisan compromise by introducing an amendment to the

identification requirement that would have allowed voters to use their signature as a form of identification. Although the amendment was eventually withdrawn in favor of the existing compromise, the prolonged debate allowed Senators the opportunity to emphasize the intended scope and limitations of the identification requirement. Proponents of the existing federal identification requirement asserted that the provision's limited applicability was intentional: "There has been a lot of misinformation about this anti-fraud provision. It applies only to a small number of voters who register by mail and vote for the first time. As Senator Bond made clear, this is the prime area of voter fraud." *Id.* at S1226-27 (statement of Sen. McConnell); *see also id.* at S2473 (statement of Sen. Bond) ("The proof of identity requirement only applies one time – the first time – to those who choose to register by mail."). Furthermore, by limiting the requirement's applicability to voters who had moved from out of state (rather than voters who had moved from one jurisdiction to another within the same state), the intended consequence was that "many fewer people [would] trigger the photo identification requirement." *Id.* at S2474-75 (statement of Sen. Schumer). Senators concluded that to apply the requirement more broadly would upset the balance between protecting the right to vote and preventing voter fraud. A more stringent identification requirement would be an undue burden on the franchise and any additional prevention of voter fraud would be minimal. The evidence presented in this case supports

the conclusion relied upon by Congress in enacting the more limited requirement.

Recognizing that many eligible voters may not have photo identification, Senators highlighted the range of permissible forms of identification that first-time voters who registered by mail would be allowed to present: "Mail registrants who vote for the first time now have many options to identify themselves. Photo ID is only one of them. A current utility bill, bank statement, government check, paycheck or any other government document would serve the purpose." *Id.* at S1227 (statement of Sen. McConnell); *id.* at S1229 (statement of Sen. Bond) ("As part of the compromise we reached over 6 months, we said one does not have to show up with a photo ID with their address on it the first time they vote after they have registered by mail, we will let them bring in or send in either a photo ID or any of a number of documents which would tend to show that they are a real person, such as a utility bill, a government check, a paycheck, bank statements."). Because "everybody does not have photo identification," Congress found it necessary to create "an expansive list of alternatives." *Id.* at S2473 (statement of Sen. Bond).

Specifically rejecting the option of requiring photo identification, Senators made a deliberate decision to permit first-time voters who register by mail to present any one of a number of different forms of identification. *See id.*; *see also id.* at S1383 (statement of Sen. Specter) ("[T]he fact of

the matter is, the underlying bill which was worked out in the compromise does not require photo identification. Photo identification is one way. There could be a bank statement, a utility bill, a paycheck, a government check or any other government document showing an address, showing a person is in existence. If the underlying bill required a photo identification, I would say that is too difficult. There are many other ways to establish that the person actually is in existence...."); *see also id.* at S1416 (statement of Sen. Specter). The benefits of making it easier for first-time voters to vote by allowing greater flexibility in the identification requirement outweighed any perceived benefits of preventing potential voter fraud by requiring such voters to present a specific form of photo identification. The language of HAVA's identification requirement was deliberate; Congress did not intend that voters would be required to present a specific form of photo identification any more than it intended that voters would be required to present no form of identification whatsoever. Instead, voters were to be given a very specific, and extensive, list of acceptable forms of identification. Presenting any one of the alternate forms of identification would serve to prevent fraud without disenfranchising voters who lack a current photo identification card. HAVA's identification requirement would be meaningless if a state could allow a first-time voter who registered by mail to vote without identification; it would be equally meaningless if a state could deny such voter the right to vote unless she produced a government-issued photo identification card.

C. Indiana Voter Identification Requirement Improperly Extends Applicability of Federal Identification Requirement and Narrows List of Permissible Forms of Identification.

In contrast to HAVA's limited identification requirement, the photo identification requirement imposed by Indiana Senate Enrolled Act 483 (enacted in 2005) requires all voters wishing to vote an official ballot to present a photo identification issued by the United States or the state of Indiana. *See* IND. CODE § 3-5-2-40.5 ; § 3-11-8-25.1. The proof of identification must show the name of the individual to whom the document was issued, and the name must conform to the name in the individual's voter registration record. *See* § 3-5-2-40.5(1). In addition, the document must include an expiration date and must expire after the date of the most recent general election. *See* § 3-5-2-40.5(3). Photo identification that does not include an expiration date will not be accepted. The only exception to the photo identification requirement is for an individual who votes "in person at a precinct polling place that is located at a state licensed care facility where the voter resides." § 3-11-8-25(e) . Indiana law requires all other voters, whether they are voting in Indiana for the first time or the twentieth time, to present photo identification before casting an official ballot.

Indiana law imposes additional identification requirements on voters who registered to vote by mail and have not previously voted in a general election in Indiana. *See* § 3-7-33-4.5(a). In addi-

tion to the photo identification described above, first-time voters who register by mail must *also* present to the poll clerk "current and valid photo identification" or a "current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter." § 3-11-8-25.2(b).[4] According to the 2007 Indiana Election Day Handbook provided by the Indiana Secretary of State and the Indiana Election Division, a current and valid photo identification that meets the additional documentation requirement must contain "the voter's current name and address." 2007 INDIANA ELECTION DAY HANDBOOK 13 (July 2007). Although an Indiana driver's license may meet both identification requirements if it did not expire on or before the most recent general election and contains the voter's current name and address, first-time voters who register by mail and do not have Indiana driver's licenses may be required to present two forms of identification before casting an official ballot: one issued by the United States or the state of Indiana that includes the voter's name, photograph, and an expiration date after the date of the

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[4] Indiana enacted its first identification requirement in 2003, subsequent to the enactment of the Help America Vote Act of 2002. In 2005, the Indiana legislature amended the Indiana Code to require all voters to present photo identification. The legislature also amended the original identification requirement to clarify that the requirement for first-time voters who had registered to vote by mail would be in addition to the proof of identification requirement applicable to all voters. *See* 2005 Ind. Legis. Serv. P.L. 109-2005 (S.E.A. 483).

most recent general election, and one that contains the voter's current name and address. Any first-time voter who registered to vote by mail and who cannot produce both forms of identification will not be permitted to cast an official ballot.[5] Taken as a whole, the Indiana requirements are inconsistent with federal law, and unduly burdensome to the right to vote, and to have that vote counted.

D. HAVA Identification Requirement Preempts Indiana State Law.

HAVA's identification requirement preempts the state law requirement that all Indiana voters present photo identification before casting an official ballot. Preemption may be either expressed or implied, but it "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). HAVA very clearly and explicitly addressed what form of identification is necessary to vote in a federal election, and who is required to present such identification.

In those instances where there is no formal statement of preemption, the Court looks to statutory language, the structure and purpose of the

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[5] In addition, because the Indiana statute is unnecessarily complicated with respect to the treatment of first-time voters, it will undoubtedly confuse precinct workers and lead to different voters being subject to different standards.

statute, and congressional intent. *See id.* at 96; *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000). Here, Indiana law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). By requiring all voters to present at least one form of photo identification before casting an official ballot in federal elections, the Indiana legislature has rendered inconsequential the careful balance struck by Congress in enacting the Help America Vote Act of 2002. The Indiana requirements provide voters with fewer options for verifying their identity rather than more options; they make it harder to vote, rather than easier. *See* 148 CONG. REC. S2536 (2002) (statement of Sen. Dodd).

By enacting HAVA, it was Congress's expressed intent to impose mandatory federal requirements upon the states. This is not a case where Congress has not conveyed its purpose clearly, nor is the purpose of the Congress unexpressed or ambiguous. On the contrary, the directions of the Congress were explicit, and its purpose clear. *See United States v. Culbert*, 435 U.S. 371, 379 (1978) (where "Congress has conveyed its purpose clearly, ... we decline to manufacture ambiguity where none exists"); *Scarborough v. United States*, 431 U.S. 563, 577 (1977) (presumption that Congress does not intend to change federal-state balance applies only "when we are uncertain about the statute's meaning"; it is "not to be used 'in complete disregard of the purpose of the legislature'") (quoting *United States v. Bramblett*, 348 U.S. 503,

510 (1955)); *but see United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943) ("An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous."). First-time voters who register to vote by mail must present current and valid photo identification or a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. *See* 42 U.S.C. § 15483(b). Congress rejected as too restrictive any extension of this requirement to other voters, or any limitation on the type of identification required. To allow states to impose such restrictive requirements would be to preclude the accomplishment and execution of Congress's purposes and objectives. *See Hines*, 312 U.S. at 67.

Congress crafted a specific list of acceptable forms of identification and narrowly defined the class of voters to whom the identification requirement would be applied. Although it left states some discretion in devising specific methods of complying with the requirements, the requirements themselves were mandatory. *See* 42. U.S.C. § 15485 . Accordingly, while the manner of achieving such requirements may vary, any failure to

comply with the requirements is a violation of federal law.

HAVA does not preclude states from establishing their own election technology and administration requirements, as long as such requirements are not inconsistent with federal requirements. *See* 42 U.S.C. § 15484. States are granted leeway in the implementation of certain requirements only to the extent that the state's manner of implementing the requirements does not conflict with HAVA's overall purpose. For example, states wishing to adopt election equipment testing and certification regimes that are more rigorous than the systems required by HAVA would be permitted to do so because the adoption of more rigorous systems is consistent with the text of the statute as well as the Act's intended purpose. HAVA does not, however, grant states the discretion to ignore federal mandates, nor does it allow states to alter the scope of a federal requirement to suit its own purposes. Accordingly, while HAVA can be reasonably read to allow a state to determine how it would comply with the identification provision, it does not allow a state to substitute its judgment for Congress's when defining the form of identification required. Nor does it allow states to define the class of voters to whom the identification requirement would apply.

A state may not impose a requirement that is inconsistent with the corresponding HAVA re-

quirement. *See* 42 U.S.C. § 15484.[6] The photo identification requirement in the Indiana statute is "inconsistent" with the HAVA identification provisions because it does not allow voters the option of presenting different types of identification. Congress specifically included a list of alternative

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[6] HAVA prohibits a state from enacting election technology or administration requirements that are either inconsistent or less strict than the corresponding federal requirement. *See* 42 U.S.C. § 15484. The statute does not require that the state requirement be both inconsistent *and* less strict in order to be prohibited. The Indiana statute, however, fails on both counts. In addition to being inconsistent with the federal identification requirement, the Indiana requirement is less "strict" in the sense that it diminishes HAVA's central purpose: it makes it harder for eligible to vote, rather than easier. In *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 576 (6th Cir. 2004), the 6th Circuit Court of Appeals approved an Ohio statute that required individuals wishing to cast provisional ballots to sign affidavits that affirmed less information than the affidavits required in HAVA. The statute was approved because it "ask[ed] less of voters than HAVA permits." *Id.*; *see also id.* ("HAVA's requirements 'are minimum requirements,' permitting deviation from its provisions provided that such deviation is 'more strict than the requirements established under' HAVA in terms of encouraging provisional voting."). By requiring less information on the affidavit, the Ohio statute made it easier for people to vote; it was more "strict" because the end result of its deviation was to achieve one of the federal law's primary objectives (i.e., widespread availability of provisional balloting). Here, by requiring all voters to provide photo identification, and by failing to allow for an alternative form of identification, the Indiana statute asks more of voters than HAVA permits. It is less "strict" because the end result of Indiana's deviation from the federal requirement is to negate one of HAVA's primary objectives: to protect an eligible voter's right to vote, and to have that vote counted.

forms of identification that could be used by individuals in lieu of photo identification. *See* 42 U.S.C. § 15482(b)(2)(A)(i)(II). If Congress intended to require voters to present a specific type of photo identification in order to vote, then it would not have defined the scope of permissible identification to include utility bills, bank statements, paychecks, and other government documents. *See id.* The Indiana statute is also inconsistent with the federal requirement because it is not limited in its applicability. Rather than applying only to first-time voters who registered by mail, the photo identification requirement applies to all voters in the state of Indiana. By omitting the alternative forms of identification, and by requiring all voters to present identification, the Indiana statute is inconsistent with both the letter and the intent of the federal statute.

To allow Indiana to require all voters to present photo identification renders meaningless the compromise reached by Congress in enacting a voter identification requirement for first-time voters. Accordingly, because the Indiana statute is inconsistent with HAVA's voter identification provision, federal law preempts the Indiana requirement that all voters present photo identification.

CONCLUSION

For the foregoing reasons, the Court should find that with respect to federal elections, the Indiana photo identification requirement is preempted by the Help America Vote Act of 2002. The judgment below should be reversed.

Respectfully submitted,

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